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IN THE

Supreme Court of the United States

October Term, 1964.

No. 485

JEROME REHMAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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PEOPLE OF THE STATE OF CALIFORNIA,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner, Jerome Rehman, a licensed Doctor of Osteopathy, respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of California denying a petition for writ of habeas corpus filed by petitioner seeking removal of a judicially imposed condition of bail on appeal that he not practice his profession during the pendency of his appeal albeit his license to practice has never been suspended nor revoked by the authorities of the State of California charged with the responsibility for such matters.

Opinion Below.

There are no written opinions by the courts below.

The order of the court below denying the petition is set out hereafter as Appendix "A".

Jurisdiction.

1. The date of the judgment sought to be reviewed and the time of its entry is July 1, 1964 [R. ....; Appx. A].

2. No rehearing was sought in the court below and no extension sought in this Court within which to petition for certiorari.

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 1257(3) and 2101(c) and Rule 22(3) of the Rules of this Court.

Questions Presented for Review.

Is it violative of the due process clause of the Fourteenth Amendment and/or of the excessive bail or cruel and unusual punishment provisions of the Eighth Amendment, as incorporated in the Fourteenth Amendment against the States, for a condition of bail on appeal to be judicially imposed that the defendant not engage in the practice of medicine when his State license to practice is in good standing and has not been revoked or suspended by the State authorities charged with the authority for that function?

Constitutional Provisions Involved.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statement of the Case.

Facts.

The facts pertinent to this petition are not in dispute.

Petitioner, a licensed Doctor of Osteopathy, was charged in a complicated two count indictment [Ex. A, to Application re Bail Pending Appeal in the California District Court of Appeal] with involuntary manslaughter (Count I),[1] and in the other count, Count II, with conspiracy: (1) to commit acts injurious to public health (a reference to Penal Code §182[5]; (2) to violate Penal Code §240 (assault); (3) to violate Penal Code §242 (battery); (4) to violate Penal Code §484 (theft); (5) to violate Business and Professions Code §2141 (practicing medicine without a license); (6) to violate Business and Professions Code 650 (payment for referrals); (7) to violate Insurance Code §556 (false or fraudulent claims); (8) to violate Health and Safety Code §10675 (failure to file or filing false information); (9) to violate Health and Safety Code §1417 (penalties for violating any of the provisions of, or rules and regulations promulgated under, Chapter 2 (Hospitals) of Division 2 (Licensing Provisions) of said Code. [How one can conspire to, or even sub-

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[1]This count was dismissed by the trial court, which order was affirmed by the District Court of Appeal and a hearing granted and presently pending before the court below (*People v. Rehman*, Crim. No. 7957).

stantively, violate the last mentioned code section is but one of the many substantive points on appeal.]

The trial of Count II lasted over 10 months, during the first approximately eight months of which petitioner was on $10,000.00 bail and during the last month and a half thereof he was on his own recognizance.

The jury verdict of guilty on Count II was returned on Friday, August 2, 1963, at which time the court set the matter of probation and sentence down for hearing on August 30, 1963 and remanded petitioner to custody [Tr. 21772]. In these proceedings on August 2, applicant's trial counsel, Albert C. S. Ramsey, was engaged in another court [Tr. 21764] and another attorney was representing petitioner [Tr. 21759]. Because of trial counsel's absence, the matter of bail was put over until the following Monday, August 5, 1963, but petitioner remained in custody [Tr. 21774-5].

On Monday, August 5, 1963, prior to the opening of court, Mr. Ramsey had a conference in chambers with the judge in the presence of the deputy district attorney. No reporter was present. In that conference, Mr. Ramsey urged upon the judge that petitioner be released upon his own recognizance. The judge advised Mr. Ramsey that he would release petitioner from custody only if he, petitioner, agreed not to practice medicine pending the probation report [Ex. B to Application before the District Court of Appeal]. Thereafter in open court, the court did release petitioner on his own recognizance on condition, *inter alia*, that he not practice medicine pending the hearing on the probation report and the time set for imposition of sentence [Tr. 21798].

On that date, August 30, 1963, the court denied the probation, sentenced petitioner to the term prescribed by law and the matter of bail pending appeal was continued to September 6, 1963. On this latter date, the court admitted petitioner to bail pending appeal in the amount of $7500.00 and on condition that petitioner "freely and voluntarily surrender (his) license to practice medicine in the State of California and agree that it may be deemed suspended and invalid, effective this date and continuing until final determination on appeal." Petitioner signed a statement to that effect [Ex. C, attached to Application before the District Court of Appeal].

Thereafter, by way of petition for writ of prohibition petitioner sought from the District Court of Appeal an order deleting the condition that petitioner not practice medicine pending appeal (*Rehman v. Superior Court*, 2nd Civ. No. 27781). This petition was denied. Among the points made by Real Party In Interest in said proceeding was that before coming to the District Court of Appeal, petitioner should seek modification from the Superior Court (Points and Authorities in Opposition to Writ of Prohibition, p. 9).

Following the District Court of Appeal's denial of the petition in No. 27781, petitioner did repair to the Superior Court and moved for an Order Cancelling and Vacating Agreement of September 6, 1963 and Permitting Bail to Continue, Pending Appeal. This motion was heard on November 26, 1963 and was denied [Ex. D, attached to Application in District Court of Appeal].

Thereupon, petitioner returned to the District Court of Appeal, again by way of petition for writ of pro-

hibition seeking a deletion of the condition for his bail pending appeal. (*Rehman v. Superior Court*, 2nd Civ. No. 27952.) This petition was denied. Petitioner then sought a hearing, and/or a writ of prohibition directly, in the California Supreme Court. This petition was denied by that Court. Among the points made by the Real Party In Interest in opposition in the California Supreme Court was that prohibition was not the proper remedy but that the correct procedure was to apply directly in the District Court of Appeal under Rule 32(b), California Rules of Court (Points and Authorities in Opposition to Petition, p. 11). Real Party In Interest had made this same point in both prior proceedings before the District Court of Appeal.

Thereafter, petitioner filed with the California District Court of Appeal, pursuant to Rule 32(b), California Rules of Court, on Application re Bail Pending Appeal in which he sought elimination from his bail of the proscription. This application was denied without opinion on May 11, 1964.

On May 20, 1964, petitioner filed with the court below his Petition for Writ of Habeas Corpus and/or Application for Bail Pending Appeal and/or Petition for Hearing on Application re Bail Pending Appeal in which he again sought elimination of the proscription. This petition was denied on July 1, 1964.

Hence this petition for writ of certiorari.

How the Federal Question Was Raised.

A. In the Trial Court.

In his application before the Superior Court to be relieved of the condition, petitioner urged "that defendant, involuntarily and as a result of duress, signed an agreement which is in violation of due process . . .

under the Fifth and Fourteenth Amendments to the Constitution of the United States." [P. 3, lines 8-10, of Motion].

B. In the Court Below.

In his first petition in the court below, petitioner urged his right to bail without the debilitating condition as a right "contemplated . . . within the Fifth and Fourteenth Amendments of the Constitution of the United States." (P. 23 of Petition).

In the petition from the denial of which petitioner here seeks review, petitioner posed the question as "whether, consistent with . . . . the due process clause() of . . . the Fourteenth Amendment to the United States Constitution, and the right against excessive bail and/or cruel and . . . unusual punishment clauses of . . . . the Eighth Amendment to the United States Constitutions as incorporated in the Fourteenth Amendment, onerous conditions of bail on appeal may be imposed —not for the purpose of insuring the appellant's attendance at court if and when required—but for other purposes—in this case, that defendant not commit crimes during the practice of medicine."

Actually, upon reflection, the matter might well have been phrased differently. That is to say, the condition of bail imposed by the trial court is more than a prohibition against defendant's merely not committing any further crimes (if, indeed, he has committed any—a matter which is for the appellate proceedings to decide). The prohibition is blanket against his practicing medicine at all, albeit properly and lawfully. This, of course, is the thing of which petitioner complains and why he is seeking relief from this broadside impediment to his being able to work at all in the profession for which he is licensed.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME.

I.

The Question as to Whether Onerous Conditions May Be Imposed on Bail on Appeal Which Are Not for the Purpose of Securing the Appellant's Attendance at Court and Which Have no Relationship to the Matter of Appellant's Attendance at Court When Needed, Has Never Been Decided by This Court; It Is a Novel and Important Question Which Merits Review.

We submit that the concept of tacking on to bail on appeal conditions which have nothing to do with insuring the attendance of the defendant in court when needed, is an ominous one. We urge that, in the nature of things, it is precisely the kind of question which merits this Court's attention. We have found no cases in which this Court has passed upon the matter. Its novelty and importance are manifest.

In *Sica v. United States,* 7 L. ed. 2d 778, 82 S. Ct. 669, in a most unusual situation, Mr. Justice Douglas imposed as a condition of bail on appeal that the appellant remain in the District of the convicting court and personally report each day, excluding Sundays and holidays, to the United States Marshal or a designated deputy, and that if appellant left the District or failed to report, his bond shall be deemed to have been forfeited. This was, as we say, an unusual situation and one not normally imposed on bail. But the condition was clearly directed to that purpose for which bail is intended: to insure as reasonably as possible the defendant's attendance when needed.

But the condition in the instant case has no such purpose. There is no fear in this case of flight, nor is there any question of substantial questions on appeal (about which we will say a little more below). The condition is an out-and-out onerous one (completely incapacitating petitioner of the ability to earn a livelihood) and having no relationship to the purpose of bail.

Speaking of a somewhat similar situation in which a surety company had petitioned the court for recovery of bail which had been forfeited when the defendant letf the district without permission to do so in violation of a clause in the bond, the court in *United States v. D'Argento*, 227 F. S. [E.D. Ill. 1964] said (p. 602):

> ". . . If a purpose of the clause limiting travel was to insure against future criminal conduct, it could easily have read with more clarity to that end. More important, however, is that such a purpose would be utilizing bail for a function which, historically, it was never intended,[5] . . ."

We urge this to be the case as to the condition at bar.[2] But whether it be the case or not, the question

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[5]Conceivably, bail might be considered 'excessive' within the meaning of the Eighth Amendment by virtue of unreasonable and oppressive conditions imposed in the issuance of bail, apart from the monetary amount. Cain v. United States, 148 F.2d 182 (9th Cir. 1945); Cohen v. United States, 82 S. Ct. 526, 7 L.Ed.2d 518 (1962) (Douglas, J. in chambers)."

[2]It is no longer open to question but that the Eighth Amendment guarantees are applicable to the States through the Fourteenth Amendment (*Robinson v. California*, 370 U. S. 660, 666-7).

certainly is of the type which calls for this Court's attention.

In *Yanish v. Barber*, 97 L. ed. 1637, 73 S. Ct. 1105, conditions of the bond of one under an order of deportation were that he notify the Immigration Service of any change of address or employment, that he apply to the Immigration Service for permission to change his residence from one district to another, that he terminate and remain dissociated from membership, association, etc., with the Communist Party, that he refrain from associating with any person who was a member, etc. of such party, and that he not violate the Smith Act (18 U. S. C. 2385) and the Internal Security Act (50 U. S. C. 783).

In ruling such conditions to be improper and in admitting applicant to bail "in the conventional meaning of the term" pending appeal, Mr. Justice Douglas said (97 L. ed. 1640):

> ". . . The function of bail in situations such as the instant one is to provide security for the appearance of the prisoner on the one hand and to protect his right to appeal on the other. It is not apparent how at least some of the conditions attached to the bond serve those ends. . . ."

The deportee was employed by the People's World, a Communist paper. Justice Douglas noted that the conditions imposed would require the deportee to give up his employment or submit to incarceration. The parallel here is apt. *Carlisle v. Landon*, 97 L. ed. 1642, 73 S. Ct. 1179, is to the same effect.

* * *

We have said that there are substantial questions on the appeal on the merits. This has never been questioned by any of the courts below nor by respondent. The admission of petitioner to bail, albeit on condition, shows this. (*Cf.* California Penal Code 1272[3] which on its face seems to authorize the denial of bail altogether.) The case is an exceedingly complicated one; even a cursory examination of the indictment [Ex. A attached to the District Court of Appeal Petition] demonstrates this. The trial was lengthy (over 10 months and over 21000 pages of reporters transcript). During the proceedings on bail [Ex. B, p. 23, attached to petition in the District Court of Appeal], the trial court itself said: "In this particular case, as you have indicated, we did have many new and novel points as to what a doctor, or what other persons in the medical profession can or cannot do." In its statement to the jury after it returned the verdict and before discharging it, the Court said [Tr. 21762]:

> "(W)e are in a situation where many of the laws pertaining to the practice of medicine in California, in my opinion, are in need of possible revision. They are very ambiguous in parts and the laws do not cover many of the activities that are going on in our every day life."

Among the substantial questions in the case is that portion of Count II of the indictment which charged a violation of a portion of California Penal Code §182 (5), namely:

> "If two or more persons conspire:
>
> "...

"5. To commit any act injurious to public health . . .

". . .

"They are punishable as follows . . ."

Subsection 5 *in toto* reads:

"To commit any act injurious to public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws."

In *Musser v. Utah*, 333 U. S. 95, this Court suggested that a similar Utah statute was unconstitutional. This Court said (pp. 96-97):

"It is obvious that this is no narrowly drawn statute. . . . Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order. . . . Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. . . . Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."

In the case, the court itself had raised the question of constitutionality and because the matter had not been considered by the State courts, the case was remanded for consideration by the Utah Supreme Court as to the meaning of the statute. On the remand, the Utah Supreme Court said it was "unable to place a construc-

tion on these words which limits their meaning beyond their general meaning" and held the statute unconstitutional (*State v. Musser,* 118 Utah 537, 223 P. 2d 193, 194).

In California, the constitutionality of the "injurious to public health clause" has never been decided. The clause may well be held to fall because of the vice of vagueness. (*Cf. Bouie v. City of Columbia,* No. 10, Oct. Term, 1963; decided June 22, 1963). In any event, the substantiality of the questions on appeal is clear.

Conclusion.

Bail pending appeal is an important part of the administration of justice. It is an attribute of due process because it is "basic to our system of law . . . Doubts whether it should be granted or denied should always be resolved in favor of the defendant." (*Herzog v. United States,* 99 L. ed. 1299, 1301, 75 S. Ct. 349, Opinion of Mr. Justice Douglas, as Circuit Justice). By the same token, when bail is granted, it should be granted in accordance with the "conventional meaning of the term" (*Yanish v. Barber,* 97 L. ed. 1637, 1641, 73 S. Ct. 1105 [Mr. Justice Douglas, as circuit Justice]) and conditions not imposed which seek to water down or change the judicial course of the purpose of bail.

Certainly the case is one in which certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioner.

APPENDIX A.

Order Denying Writ of Habeas Corpus.

Crim. No. 7962.

In the Supreme Court of the State of California, in Bank.

In re Rehman on Habeas Corpus.

Petition for writ of habeas corpus Denied.

William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 9th day of July A.D. 1964.

William I. Sullivan, Clerk
By K. Hawker
Deputy Clerk
Gibson
Chief Justice